APPENDIX

APPENDIX A

OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS

Argued March 2, 1982 Decided May 5, 1982

MURNAGHAN, Circuit Judge:

A most sympathetic case from the plaintiff's point of view here illustrates the great importance of counsel's doing things right. Each failure to dot "i"s and cross "t"s contributed to a multiplication of error to the point where a result unfavorable to the plaintiff was the consequence. Plaintiff can point to occasions where omission or oversight of counsel could have been counteracted by the district judge's treating as done what ought to have been done. However, the fact that there was discretionary relief available does not mean that a refusal to grant it constitutes error. So to hold would be to obliterate the

concept of trial court discretion. We know of course that such discretion is broad, and that abuse of discretion must be shown for a party to prevail on appeal. We have concluded that no adequate grounds have been advanced which merit reversal or remand, and we affirm.

The plaintiff, Samuel Clyde Morrell, was born with congenital extrophy of the bladder. Under the supervision of Dr. Howard E. Strawcutter, at the age of twenty-six, he was admitted to Southeastern General Hospital. It was determined that an operation was necessary. Plaintiff's family urged that, rather than have Strawcutter and his assistants (together the other Strawcutter defendants) perform the operation, Morrell be transferred to Duke University Hospital for the operation to be conducted there by Duke University Hospital personnel. The Strawcutter defendants

acquiesced in the transfer decision, failing, however, to inform Morrell's family of possible risks attributable to the delay resulting from the removal of Morrell to Duke.

Following the operation at Duke, Morrell's condition has become tragic in the extreme. In the words of his counsel, he is a vegetable.

Separate actions, one against the Strawcutter defendants, one against the Duke Defendants and Southeastern General, were instituted in the United States District Court for the Eastern District of North Carolina. They were consolidated. At a time when the plaintiff claims he was entitled to a

F.R.CIV.P. 41(a)(1)(ii)[1] voluntary

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1 Rule 41. Dismissal of Actions.
(a) Voluntary Dismissal: Effect Thereof.
(1) By Plaintiff; by Stipulation. Subject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

dismissal without prejudice based on a stipulation allegedly signed by all parties who had appeared in the action,[2] his counsel filed instead a F.R.CIV.P. 41(a)(2)[3] motion seeking dismissal of Duke defendants without prejudice to

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2 Cf. Harvey Aluminum, Inc. v. American Cyanamid Co., 203 F.2d 105 (2d Cir. 1953), cert. denied, 345 U.S. 964 (1953).

3 Rule 41. Dismissal of Actions.
(a) Voluntary Dismissal: Effect Thereof.

. . .

(2) By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

reinstitution of the suit at some later date. The Duke defendants consented; the Strawcutter defendants did not object. However, consent of court must be obtained for a Rule 41(a)(2) motion. For whatever reason, perhaps conservation of judicial resources by requiring both actions, involving substantial overlap of proof, to be tried together,[4] the

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4 A motion to sever the Strawcutter defendants' case from that of the Duke defendants was denied by the district court. On that occasion plaintiff's counsel took the position that the "two cases are literally the same case with some of the Defendants being named in one case and the remainder in the second, (and) the case should logically be prepared and tried as one case."

district court refused to grant a Rule 41(a)(2) voluntary dismissal without prejudice.

Morrell's attack on that denial of relief is only secondarily directed at a supposed abuse of discretion because of the district judge's refusal to exercise the powers conferred by Rule 41(a)(2). Rather, it concentrates on the failure by the district judge to recast the motion as a Rule 41(a)(1)(ii) motion masquerading as a Rule 41(a)(2) motion and to grant it in that guise. We may assume that such an unmasking of a disguise was a possible course for the district judge to follow, 5 Moore's Federal Practice § 41.02(2) (1981); but he was by no means obliged to do so. If one does not avail oneself of a privilege afforded by the Rules, but chooses instead to follow a different course, one may be held to the choice one has made.

Here that is particularly the case where the district court clearly was entitled to consider the impact on its docket if the quest for relief of Morrell were allowed to run its full course against the Strawcutters alone, and then were permitted to begin all over again against the Duke defendants. Inevitablely that would lead to a substantial amount of repetitive testimony.[5] Considerations

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5 Plaintiff, in opposing severance, asserted:

> If the cases are separated, the Defendants in one case will have to be witnesses in the other case; when the second case is tried, the Defendants in the first case will have to be witnesses in that case.
> . . .

not unlike those preventing piece-meal appeals were present.[6]

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6 A concession by the Duke defendants at oral argument acknowledged that the Rule 41(a)(1)(ii) point had been preserved for appellate purposes. That may well be the case even absent such a concession in view of the liberal interpretation the rules receive. See 5 Moore's Federal Practice § 41.07 at 41-100 (1981). However, we mention in passing that prudence would have dictated mention of the point in the notice of appeal. Plaintiff, however, as to the Duke defendants, only appealed "from the entry of the order of involuntary dismissal under Rule 41(b)." F.R.A.P. 3(c) requires that "the notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken." It could be argued that the appellant consciously restricted the appeal to the separate Rule 41(b) contention hereinafter discussed.

Thereafter, while the Rule 41(a)(2) motion remained undisposed of by the court, so that the Duke defendants were still parties, the preparation of the case for trial proceeded. Plaintiff's counsel concentrated effort on the case against the Strawcutter defendants. Interrogatories of the Duke defendants were responded to only on the day trial was to commence.[7] Morrell's counsel could provide no expert witness list and was not ready to proceed against the Duke defendants. Burdened by extremely high medical bills, the plaintiff and his family simply could not, according to

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7 By agreement with the Duke defendants, plaintiff was excused from filing answers to interrogatories until plaintiffs' Rule 41 (a)(2) motion was denied. The denial first came on March 9, 1981, and was renewed on March 24, 1981, following a motion by plaintiff for reconsideration. The answers to interrogatories were filed on April 6, 1981, the date on which the case was called for trial.

counsel, afford to retain an expert to testify against the Duke defendants. He acknowledged that the prospect of settlement in light of negotiations which were taking place and his expectation that the pending Rule 41(a)(2) motion for voluntary dismissal without prejudice would be granted had caused him to be unprepared to proceed against the Duke defendants.

It requires no extended discussion, however, to establish that such prospects or expectations are insufficient to excuse counsel from getting the case ready for trial. Plaintiff here had not obtained any expert witness to establish failure of the Duke defendants to adhere to medical norms of acceptable performance. The absence of such testimony would be fatal to many a plaintiff's case under North Carolina law. Smithers v. Collins, 52 N.C. App. 255,278 S.E.2d 286, 289-290

(1981). In any event plaintiff's counsel conceded "that he had no evidence . . . which he could present at the trial."

The next step was a motion by the Duke defendants for an involuntary dismissal with prejudice under Rule 41(b). It was granted. The district judge observed that "Plaintiff could interpose no objection or responsive argument in opposition to said Motion for Involuntary Dismissal."

The grant of the Rule 41(b) motion was not an abuse of discretion. It was evident that counsel had resorted to an established practice of suing everyone who might conceivably be liable, without first investigating sufficiently to be in a position to prove that one or more such defendant had, in fact, failed in any way to perform with due care. The conse-

quences of the practice are harrowing enough for any defendant. For doctors and hospitals they are especially disturbing. Their whole professional careers, or reputations as health care providers are at stake. It constitutes no abuse of discretion to decide, as the district judge decided, that, when a case has come to the day of trial, it is incumbent upon the parties to be ready.

As we have held that denial of the motion for voluntary dismissal without prejudice was proper, reliance by plaintiff on hope that it would be granted was inappropriate. The possibility of denial was not something that counsel for the plaintiff could safely ignore. The Duke defendants were entitled to freedom from the overhanging threat of the case where the plaintiff had

to confess that he lacked the evidence necessary to establish a right to recovery.

The case did proceed against the Strawcutter defendants and resulted in a jury verdict for the defendants. Morrell objected to the district judge's deletion from his charge of an "informed consent to treatment" instruction after he had initially indicated to counsel that one would be given. The district judge had determined, on reflection, that the facts of the case did not warrant the instruction. We are satisfied that he was right.

The facts of the case would have merited an instruction that negligence might be found in a failure adequately to inform the patient

and his family of risks associated with a doctor's decision not to treat, such as the one made here to step aside in favor of the Duke University Hospital. However, that was not the instruction the deletion of which Morrell's counsel objected to.[8] The instruction read:

> Consent may be either expressed or implied. Express consent is authorization

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8 Indeed the instruction plaintiff's counsel now insists should have been given had not been requested by counsel. It was originally included in the charge at the district judge's own initiative, just as it was subsequently deleted by him.

to perform the treatment or operation either through written or spoken words. Consent is implied when the actions or conduct of the patient reasonably warrant the belief that he consented to the operation or treatment.

For either type of consent to be valid, the patient must be reasonably informed of the risks involved. Consent is not valid if it is induced by representations that are false to the knowledge of the practitioner who makes them. Further, except in an emergency, a practitioner has a duty to make a reasonable disclosure of the risks involved if the treatment or operation involves known risks of which it is likely that the patient is unaware.

There is no hard and fast rule as to the extent of disclosure required. Where the likelihood of an adverse result is relatively slight, much must be left to the discretion of the practitioner in determining what he should tell the patient as to possible adverse consequences. While the patient has the right to an informed election as to whether to undergo the proposed treatment or operation, it must be borne in mind that the practitioner's primary concern at the time of consultation is, and should be, the treatment of the patient's illness or disability, not preparation for the defense

> of a possible lawsuit. Obviously, an increase in the normal anxiety of one about to undergo an operation or treatment is not medically desirable. Advice which is calculated to increase such anxiety by recounting unlikely possibilities of undesirable consequences is not consistent with the above stated duty of the practitioner to his patient. A different situation is presented where the practitioner know(s), or should know, that the proposed operation, treatment, or drug has a high ratio of adverse reaction or complications of a serious nature, not likely to be known to the patient.
>
> The practitioner should disclose any danger of which he has knowledge and of which the patient needs to be advised in order to determine intelligently whether to consent to the risk. Breach of this duty is negligence.

The charge manifestly is cast in terms of consent to an operative procedure or affirmative treatment, not of a consent that the physician decline to operate or otherwise refrain from treating in deference to a performance by others of the indicated medical procedure. Morrell's counsel makes a nice lawyer's argu-

ment that, just as not-to-decide may be to decide, so not-to-treat may be to treat. However, a jury's charge is for laymen, and the district judge was entitled to conclude that such convolution was likely to confuse the jury, and could well appear to indicate the presence in the case of factors which simply were not there.

Morrell's counsel did not request an instruction as to possible negligence deriving from a failure to express adequately the risks in the Strawcutter defendants' acquiescing in the transfer to Duke University Hospital and the attendant delay. He consequently has no valid complaint about a failure to give a somewhat superficially similar, but in actuality quite different, and in the circumstances inappropriate, instruction, an instruction potentially productive

of confusion in the jurors' minds.

Furthermore, considering the charge to the jury as a whole, the point was elsewhere adequately dealt with in the instructions which were given reading:

> In this case, the plaintiff contends, and the defendants deny, that Drs. Strawcutter, Burleson and Leininger were negligent in their care and treatment of Samuel Clyde Morrell in July of 1976 by abandoning his care while he was a patient in the hospital, by failing to make reasonable and proper diagnostic tests and examinations to make a diagnosis of his condition and in failing to properly treat his condition . . . .
>
> A physician is not bound to render professional services to everyone who applies. But when a physician undertakes the care and treatment of a patient, the relationship cannot be terminated at the mere will of the physician but must last until the treatment is no longer required, or until it is dissolved by consent of the parties, or until reasonable notice is given in order that the patient may have an opportunity to engage the services of another. The failure of the physician to use reasonable care and judgment in determining when his attendance

may properly and safely be discontinued is negligence.

Finally, Morrell contends that the district judge erred in his order requiring the removal of Morrell from the courtroom after the first day and a half of trial. He was permitted to return for counsel's closing arguments. Of course, the immediate reaction is that a party, to have his day in court, must be allowed to be present throughout the trial. However, there are cases, and this is one, where exclusion of a party does not prejudice in any way the presentation of his case, and is necessary to achieve fairness for the other party. Morrell, displaying some of the cruelties to which fate had subjected him, emitted grunts and groans which led counsel and his relatives to rush to his side with a consequent interruption of the proceedings. Morrell's presence for a

day and a half of trial and for closing arguments afforded ample opportunity for the jury to assess the visible nature of his condition. His behavior, while in no way to be criticized, had become so intrusive as to infringe on orderly presentation and to generate undue sympathy. There is no contention that his presence could have affected in any way the presentation of his case. In his vegetable state, that simply was not possible. Morrell's counsel did not object to the exclusion, only requesting that Morrell be permitted to be present during closing arguments. The request was fully granted.

Accordingly, there was no abuse of discretion in the ruling that led to absence of Morrell from the courtroom for part of the trial.

AFFIRMED

JUDGE BUTZNER, with whom JUDGE CACHERIS joins, concurring:

I concur in holding that the district court's dismissal of the Duke defendants with prejudice was not an abuse of discretion. I also agree that the instructions to the jury were adequate and that the district court did not err by refusing a charge after initially indicating that it would be given. The court's removal of the plaintiff was not an abuse of discretion. Therefore, I concur in the judgment.

I disassociate myself, however, from dicta that I believe unjustifiably criticizes the plaintiff's attorney. He was unprepared to prosecute the claim against the Duke defendants for reasons beyond his control. Quite simply, because of the expense of caring for their son and preparing

the case against the Strawcutter defendants, the plaintiff's parents could not afford to engage an expert witness to testify against the Duke defendants. The plaintiff's attorney properly realized that he could not proceed against the Duke defendants without the support of expert testimony. Confronted by the inabillity to obtain an expert, he did the next best thing. Months before trial, he obtained the consent of the Duke defendants for a voluntary non-suit without prejudice. But because he did not receive the consent of all defendants, he was unable to proceed within the letter of Rule 41(a)(1)(ii). Consequently, he moved for dismissal of the Duke defendants without prejudice pursuant to Rule 41(a)(2). The Duke defendants consented to this motion, and the court granted it. Later, however,

when another party objected, the court rescinded the order of dismissal. Confronted with the reinstatement of the Duke defendants and the plaintiff's inability to proceed against them without an expert, the attorney wisely tried to settle. When negotiations proved unsuccessful, he candidly acknowledged that the plaintiff could not proceed to trial against the Duke defendants. The court then granted Duke's motion to dismiss with prejudice. The plaintiff's attorney should not be faulted, I think, for arguing that his motion under 41(a)(2) and the consent that it elicited were tantamount to a stipulation with the Duke defendants under the more favorable provisions of 41(a)(1)(ii).

The issue pertaining to the court's instructions to the jury also presents no occasion for criticizing plaintiff's

attorney. Before summation, the court advised counsel of his proposed instructions in accordance with rule 51. At that time, it stated that it would give an informed consent charge as set forth in the North Carolina pattern jury instructions, but later it omitted this charge when it instructed the jury. At the conclusion of the instructions, the attorney called the court's attention to the omission, and, complying with rule 51, he noted an objection. The court acknowledged that the attorney had requested the charge and that initially the court had agreed to give it. Upon reflection, however, it had deleted the charge. Again, the attorney is not to be faulted for assigning error to this incident of trial and for supporting the assignment with the argument that the pattern instruction was appropriate. It is true that an instruction on

informed consent could have been more felicitously phrased, but after the attorney received assurances that the pattern instruction would be given, his decision not to offer an alternative is quite understandable.

This was a difficult case fraught with serious consequences for all parties. From a review of the records, I am confident that the district judge did not base his rulings on the fanciful notion that the plaintiff's attorney failed to dot"i's" and cross "t's." Furthermore, for my part, our disposition of the appeal dealt with the merits of the case, and it was not tainted by reliance on such a flimsy premise.

APPENDIX B

ORDER DENYING MOTION FOR REHEARING EN BANC

Upon consideration of the appellees' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Mur[illegible]ghan with the concurrence of Judge Butzner and Judge Cacheris (U.S.D.J.).

For the Court,

/s/ William K. Slate, II

CLERK

filed June 28, 1982

APPENDIX C

MOTION HEARING OF MARCH 9, 1981, BEFORE THE HONORABLE W. EARL BRITT, UNITED STATES DISTRICT COURT JUDGE

The Court: Morrell against Strawcutter. Gentlemen, I know that we have here today to be decided whether, plaintiff and defendant, Duke University, may agree for Duke University to get out. And we may have some other things, I don't know about that.

Let's address ourselves to that aspect at the beginning.

Mr. Harris, I understand that you no longer object.

Mr. Harris: That is correct, your honor.

The Court: You did at one time, but you don't any longer?

Mr. Harris: I did at one time, your honor. If you would like an explanation, I would be glad to give it to you.

The Court: You need not explain. I

received it in writing and I take it just as you said it.

Well, let me ask you if any party has any objection as to the proposed dismissal?

Mr. Clay: Your honor, my name is Bob Clay, and together with Mr. Lee and Hal Broadfoot, I represent the defendants Strawcutter, Burleson and Leininger. This is a response to the Court's inquirey, but it's not exactly what you were asking for. We do not object to the litigants to let this party out, but we do not consent to it.

Our posture is this: Because of the structure this lawsuit has and because of the fact that it just isn't good strategy for co-defendants in a medical malpractice case to fight among themselves, we are not in a position at this time to go forward with what we considered to be an important element of truth re-

garding causation in this case. And we would ask the Court, that if you grant this motion, the Court also grant a 60 day moratorium in this case, that is put back the pre-trial conference that is scheduled for Wednesday this week, and put back the trial day, which is presently scheduled for jury selection on April 6th, for two months as well. So that we would have the opportunity to prepare our proof or alter our proof in such a way as to address issues that up until the time that this motion was made and granted would have been matters of proof as between the plaintiff and the defendant Duke.

We are not saying that we want time to go after Duke. We simply have to address the question of causation as to what happened while the plaintiff was at Duke.

The Court: Haven't you been privy to

all the discovery that has taken place up until now?

Mr. Clay: I'm sorry, your honor.

The Court: Haven't you been privy all the discovery that has taken place up to now? And don't you know what happened up at Duke?

Mr. Clay: We have the Duke records and a number of depositions have been taken. However, we haven't asked any questions based upon causation at Duke because of the posture of the case.

The Court: I see.

Mr. Clay: Now, once the posture case has altered, we do have to change our posture about it and delve into the causation question.

The Court: What do you have to say about it, Plaintiff?

Mr. McCain: Your honor, it makes no difference as to causation, whether Duke is in the case or out of the case. Duke

caused it and the fact of whether they are a party or a non-party has absolutely no bearing on the question. It's a smoke screen to buy two more months to try to put their main defense together and we argue that their oral request to delay this matter for another two more months should be denied.

I might add that on the plaintiff's motion to dismiss, and of course, Duke consents to it and no other party objects to it, and the ends of justice would be served by letting the parties--the parties don't want to litigate any more at this time, to let them settle their controversy and end that part of it now. As to the causation questions, that's a question that's in the case irregardless of whether Duke is a party or a non-party. It would be a defense available to the Strawcutter, Burleson, Leininger, Mussell Group, whether or not Duke was in the

case or not. And that matter should have been explored in the year and a half to two and a half years that these cases have been pending.

They've got a defense on causation that should have been explored before the matter was set for trial, we argue to you and submit to the court that that is simply not a good reason to further delay this matter and the request should be denied in all fairness to all parties.

Mr. Harris: May I be heard just a moment?

The Court: Yes, Sir.

Mr. Harris: On behalf of Southeastern General Hospital, I'd like to join in the request that we be given additional time.

Mr. McCain may be right, but this is a very serious and very important case. And it certainly does change the postulate case as to whether or not the

plaintiff is attempting to prosecute the Duke Hospital and/or Duke doctors and whether or not we are in a position to carry out tne burden; and I don't know if we can carry it.

But I do know that the matter is of such importance that he ought not to be here objecting when everyone else is here trying to cooperate with him to try to get this matter going, and as far as I know, there's been no delay on anybody's part.

And now, all we're asking for is to come into court and present the case properly. And it may be that we don't need it, but if we do need it, sixty days is going to be a short time in which we have to get ready.

The Court: I'm going to give you time to be heard. Go ahead.

Mr. McCain: Mr Harris argues that it changes the posture of the case. I

think certainly everybody I see to my left that has been involved with the case are very able and very experienced lawyers in the defense of these type cases.

All of us are aware that the posture of the cases can change from time to time by the granting of summary judgments, by voluntary dismissal, by directed verdicts given by the trial judge at the time of trial, and it's encumbant on all of us to prepare our client's case at the time that the court gives us the opportunity to prepare it. Changing posture of the case simply is not a good reason. There is no substance to that request.

It was said that they cooperated in getting it to trial with them. This case was set for trial in December, and I understand counsel for the Strawcutter, Leininger, Burleson group

requested and received a continuance for the trial setting. It's now March, now, and the trial was set for latter April. Another two month continuance would effectively mean another six to eight months down the road before this matter can be finally concluded in a very serious matter.

We're all able in this case. We've all had a chance to prepare our case and our defenses for trial. It's been set once for trial and a continuance was granted from that session. And we contend very strongly that the matter ought to proceed for trial.

The Court: Who represents Duke?

Mr. Bryson: If it please the Court, I'm Ed Bryson from Durham. I appear on behalf of Duke, Dr. Moran and Dr. Paulson. And would have appeared on behalf of Dr. Serva, but he was never served; he is out of the country.

But I would just like to advise the Court, not to take up too much of the court's time, but sometime ago around Christmas, I don't know when, Sir, I was advised by Mr. McCain on behalf of the plaintiffs that they would like to take a voluntary dismissal under Rule 41 as to my clients. I advised my clients of Mr. McCain's request and they instructed me to consent to it. I believe the file might reflect, I'm not quite sure what was filed with the Court, in fact, but I did sign a consent by order or motion. I can't remember the exact item.

Mr. Rountree: Both.

Mr. Bryson: I think it was on the 20th of this past month that his honor signed an order dismissing it as to my clients and then shortly thereafter, six days or so I believe it was, Mr. Harris, on behalf of Southeastern General Hospital

moved that the order be rescinded, and of course, his honor rescinded it based on an objection by one of the parties. We're still here ready to -- my client's have instructed me to be here and asked the Court allow the plaintiff's dismissal which I'm here. I don't have any argument to make, but if your honor--because we've got two lawsuits involved, one in 1980 lawsuit in which I appear, along with Mr. Harris and Dr. Williamson who Mr. Blount represents and I understand that Mr. Blount is here and has filed with the Court a motion for summary judgment to be heard today. And it's my understanding that there's no opposition to it. So, as far as the lawsuit, the one lawsuit, although I know it's not indicated, no consolidation, apparently there's no opposition to it. And I understand the rule is not an absolute rule when the plaintiff

requests it, but it's discretionary with the court; and I know his honor knows more about this than I, but again, I've been instructed to appear, and hopefully the Court will allow the dismissal as to my clients.

The Court: Well, The Court would observe the way the thing got signed, it's probably a little bit premature on my part. I'm new to it. I've just got here-- I've only been here about ten months and I'm sort of used to things being done the way that they're done in the State Court, and I really didn't pay that much attention to it. I came here and the parties had consented to it and I signed it. And upon it being brought to my attention and reading the rules 1, frankly, realized I shouldn't have done it, and that's the reason I'm giving you the opportunity today to be heard on the matter, and to decide whether I'm

going to approve dismissal in the 41-B or not.

I'll take full responsibility for the improvident interval and we'll just move on from that point.

Mr. Rountree: Judge, I think it would be appropriate for me maybe to introduce all the people involved here for the court reporter.

I'm George Rountree from Wilmington; with me is Grover C. McCain, Jr., as one of other attorneys in this lawsuit. On his left, of course, is Mr. Bryson. On his left is Mr. Harris--W. C. Harris, Jr. of the Raleigh Bar. Mr. Clay--Robert Clay; W. Osborne Lee of the Robeson County Bar; and James Blount of the Smith-Anderson firm of the Raleigh Bar. And I hope that takes care of your needs, young lady.

When it comes time for the Court to hear further on Mr. Clay's oral motion to

continue the case, I would like to be heard on it, because of --

The Court: (Interposing) You better speak while you're standing up. You might not get a chance again.

Mr. Rountree: As far as I know, except for Mr. Blount and Mr. Bryson--

Well, Mr. Blount, Mr. Lee, Mr. Harris, Mr. Bryson and I have been in this case since the inception of the case.

At the time the second case against the Duke defendants and the Southeastern General Hospital was filed, there was an order entered consolidating the cases. One or more of the defendants violently objected to that; and there was a hearing before Judge Dupree to determine the propriety of the order earlier entered by Judge Larkins.

At that hearing, the defendants Strawcutter, Burleson and Leininger announced in open court they were ready for trial.

That was difficult for me to believe because of the time involved. However, it was a judicial proclamation by those defendant;

Secondly. Duke objected to the joinder. As I recall, the other parties objected to the joinder. And-- Well, that's not quite because Mr. Harris is not there. No one representing Southeastern General Hosptial appeared.

And in fact, from the time that Judge Dupree entered his order, in effect continuing the consolidation pending further determination by the Court, the Court should deem it appropriate to continue the consolidation until the case was set for trial by this Court the 6th of April and then subsequently the 27th, there have been a number of depositions taken and a number of pre-trial discovery efforts with the exception of interrogatories filed and served on behalf of

Duke, the defendants Strawcutter, Burleson and Leininger and the defendant Southeastern General Hospital, to my knowledge, did not avail themselves of any discovery. No cross claim was filed by any of the defendants in any of the actions against any of the other defendants. Now, I discussed that with some of the defendants on occasion and for whatever reason, they have declined to do that.

Obviously, the rules envisioned defendants filing cross claims against each other, that's why there's a Rule 15. In any event, the defendants have determined to proceed without doing any discovery and without doing anything to prepare the cases against anybody as the plaintiff sees it until this case was set for trial. At that point, they are now scattering around trying to determine what they are going to do.

This is another effort as the plaintiff sees it to delay disposition of the case that has been pending in this district, at least the first version, for some years, since 1977.

The plaintiff represents his incompetent son the boy is languishing in a room specially built for him in his father's house, his mother's house in Atlanta, South Carolina and has run out of money. The boy requires around the clock nursing care, I was there on Friday.

It seems to me sir that the equities of the situation weigh with respect to rapid trial, weigh very heavily in favor of the plaintiff.

The defendants moved, as Mr. McCain pointed out, as soon as they received notice of the Janaury 26th, original setting of this trial, they moved for a continuance, which was granted by

Judge Dupree.

And the defendants have been aware for at least nine months, to my knowledge, that the plaintiff has been pressing for trial. And there's been no secret about it, we've told the defendants that we would make our witnesses available for their examination. Nobody wanted to do that. Nobody has availed themself of that opportunity.

And we think at this stage of things they should not be given any further opportunity to delay this particular case.

Mr. Lee: If it please the Court

The Court: Yes, Sir, Mr. Lee.

Mr. Lee: My name is Osborne Lee. I represent individually the Strawcutter, Burleson and Leininger. The case first came against those three individuals, and that's the case, your honor, filed in 1977. That case has been pursued very diligently with more affidavits and more

depositions than I have ever taken in my entire law practice. That case alone occupies two lose beams (phonic) boxes in my office.

The other case was filed after we made a statement and we were the parties that opposed the consolidation because we opposed it on the stated grounds before Judge Dupree. And if your honor remembers, there was an order signed without a hearing before Judge Larkins and we moved to set the order aside and Judge Dupree left the order intact and obligated the Court to consider the matter at a later date somewhat.

But at that particular juncture, that was a very important juncture at least to the defendants Strawcutter, Burleson and Leininger because up to that point, we had been dealing in urology and urological matters. Now, all of the stated contentions were dealing in urology.

Now, at that time, Rountree very eloquently introduced a participant in the trial, Mr. Bill Moore of the Georgia Bar as a doctor, or medically oriented. And he proceeded to state the theory of the case was one continuun of action. And I'd hardly used that word in breakfast time conversation in Robeson County before, but we found out that one continuum of action meant that the man had been suffering all along from something other than urological and that urology was not the problem or at least the contention for which he is ultimately suffering. That is, there's some red thing called--and I'm as good at pronouncing medical words as I am some other things, Judge-- but Anoxia (phonic); and all it was, he had a bad count of oxygen, nitrogen and all that good stuff in there.

And at that time, the depositions were

continued to be taken. And Dr. Paulson, the chief witness at Duke, two previous depositions, and the defendants had never even cross-examined him. Then it was set up a couple of times and they were able to complete that.

And so, with Duke out of it, your honor, we've got a completely different set of rules. We're playing a different ballgame because of their statements both on the record as to the negligence of Duke and the contended causes of his incompetancy now.

And you may be assured, your honor, he says that we have not done any discovery, but I would beg to differ that Mr. Broadfoot, myself, Mr. Blount, Mr. Harris, and now Mr. Clay have been very diligent in trying discovery of one sort or another, but with Duke out of there, we nave a whole new facet in order to define, because they are now put in the posture

of not being a joint defendant, nor can we use their witnesses in the same fashion we could have used them before, but we have to go back and find some other people at Duke: Dr. Seeker or Seiker; Dr. Over, a radiologist, and others that we would have to find in order to support belief.

But we believe even if you gave us a protective order, with that, plus the sixty days, we would have to spend the entire time preparing for the case, and we did not make this in order to be dilatory to the Court, your honor.

The Court: Mr. Blount, I take it your main interest here is on your motion for summary judgment?

Mr. Blount: Yes, sir.

The Court: Somebody said that counsel for plaintiff did not resist that motion, is that correct?

Mr. McCain: We don't consent to it, your

honor, but we don't have any arguments.

The Court: I didn't say that you consented, I said, don't resist.

Mr. Blount: They had indicated they would not resist anything that occurred today. So, if we're going to get out, we don't have the expense and time in continuing in pre-trial and discovery after this.

The Court: Well, if anybody wants to be heard--Do they waive? Counsel, I take it then that you waive any time requirements of the motion being filed on you?

Mr. McCain: Certainly do, your honor.

The Court: All right. Motion by the defendant Warren Williamson for summary judgment is allowed.

The motion by plaintiff and defendant Duke University Medical Center for a voluntary dismissal pursuant to Rule 41-A(2) of the Rules of Civil Procedure is denied and the case be set for trial

on April the--Jury selection on April the 6th and trial on April the 27th...

APPENDIX D

AMENDED ORDER FOR INVOLUNTARY DISMISSAL

THIS CAUSE coming on to be heard before the undersigned Judge Presiding on the 7th day of April, 1981, upon oral motion made by counsel to the Defendants, Duke University, David F. Paulson and Michael J. Moran for entry by the Court for an Order For Involuntary Dismissal pursuant to Rule 41(b), Rules of Civil Procedure, dismissing the action of Plaintiff as against said moving Defendants for reason of: 1) a failure of Plaintiff to prosecute this action as against the aforenamed Defendants, and 2) a failure of Plaintiff to comply with the rules of this Court, the specific grounds in support thereof being advanced in oral

argument by counsel to said Defendants-Movants and being set forth in particular in the written Motion For Involuntary Dismissal filed by said Defendants-Movants on the 8th day of April, 1981, in supplement to said oral motion;

And plaintiff, through counsel, having voiced his objection to the Defendants' Motion in open Court and having set forth the particular grounds for his objection in the written Response to Motion for Involuntary Dismissal filed herein;

And the Court, after a) review of the record proper in this civil action, b) hearing argument of counsel for said Defendants-Movants, c) having made inquiry of counsel to Plaintiff-Respondent as to the position of Plaintiff in response to said Motion For Involuntary Dismissal and being advised by said counsel to Plaintiff to the effect that

Plaintiff could interpose no objection or responsive argument in opposition to said Motion For Involuntary Dismissal, and d) being fully advised in the premises, being of the opinion that said Motion For Involuntary Dismissal should be allowed, it is

ORDERED AND ADJUDGED that the Motion For Involuntary Dismissal pursuant to Rule 41(b), Rules of Civil Procedure, as made by the Defendants, Duke University, David F. Paulson and Michael J. Moran, be and the same is herewith allowed.

This is the 5th day of May, 1981.

/s/ W. Earl Britt
United States District Judge

APPENDIX E

MOTION UNDER RULE 41

NOW COMES the plaintiff, through counsel, and hereby moves the Court pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure dismissing from this action without prejudice defendants Duke Univeristy (denominated in the complaint as Duke University, Inc., Duke University Medical Center and Duke Hospital), David F. Paulson, Luis Gonzalez-Serva and Michael J. Moran with leave granted to any properly appointed personal representative or guardian of Samuel Clyde Morrell to refile this action as to these defendants in a North Carolina state court having proper jurisdiction within one year from the date of this dismissal notwithstanding any statutes of limitations.

This 22nd day of January, 1981.

Rountree & Seagle

By:

/s/ George Rountree, III

Attorney for Plaintiff

McCain & Moore

By:

/s/ Grover C. McCain, Jr.

Attorney for Plaintiff

APPENDIX F

CONSENT TO GRANTING OF MOTION

NOW COME defendants Duke University (denominated in the complaint as Duke University, Inc., Duke University Medical Center and Duke Hospital), David F. Paulson and Michael J. Moran, through counsel, and hereby consent to the granting to the above motion by the Court. That defendant denominated as Luis Gonzalez-Serva has never been served with process in this action and counsel for the other defendants does

not represent Luis Gonzalez-Serva. However, counsel for the other named defendants does not take any position with regard to the granting of plaintiff's motion regarding Luis Gonzalez-Serva.

This 22nd day of January, 1981.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon

By:

/s/ E. C. Bryson, Jr.

Attorneys for Defendants Duke University, David F. Paulson and Michael J. Moran

APPENDIX G

ORDER OF DISMISSAL WITHOUT PREJUDICE

IT APPEARING from the consent of counsel for Duke and Drs. Paulson and Moran that this action ought to be dismissed as to them without prejudice and with leave to reinstitute the claims in State Court in North Carolina within

one (1) year of the entry of this order;

NOW, THEREFORE, IT IS ORDERED that the claims of the Plaintiff in this action insofar as they pertain to the Defendants, Duke University, Inc., Duke University Medical Center, Duke Hospital, David F. Paulson, M.D., and Michael J. Moran, M.D., be and they hereby are dismissed without prejudice and with specific leave granted to any properly appointed person, representative or guardian of Samuel Clyde Morrell, Incompetent, to refile this action as to any one or all of these Defendants in a North Carolina State Court having proper jurisdiction within one year from the date of this dismissal, notwithstanding any statutes of limitation.

Done in Wilmington, North Carolina, this 20th day of February, 1981.

/s/ W. Earl Britt

United States District Judge

APPENDIX H

OBJECTION TO MOTION UNDER RULE 41

NOW COMES the defendant, Southeastern General Hospital, Inc., in response to plaintiff's motion pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure to dismiss from this action without prejudice defendants Duke University (denominated in the complaint as Duke University, Inc., Duke University Medical Center and Duke Hospital), David F. Paulson, M.D. Luis Gonzalez-Serva, M.D., and Michael J. Moran, M.D.

Defendant Southeastern General Hospital objects to the dismissal of the above named co-defendants on the ground that their joinder as parties is necessary to a complete and fair adjudication of plaintiff's claims for professional malpractice. Further, in the event the Court orders dismissal of the

above named parties as co-defendants, defendant Southeastern General Hospital will move for joinder of said persons and institution as third party defendants pursuant to Rule 14(a) of the Federal Rules of Civil Procedure.

This the 26 day of February, 1981.

Harris, Cheshire, Leager & Southern

By:

/s/ W. C. Harris, Jr.

Attorneys for Defendant Southeastern General Hospital

APPENDIX I

ORDER

The Court's Order of 20 February 1981 dismissing this action without prejudice as to Defendants Duke University, Inc.; Duke University Medical Center; Duke Hospital; David F. Paulson, M.D. and Michael J. Moran, M.D. is hereby rescinded. All parties

shall have an opportunity to be heard before the matter is considered further.

SO ORDERED.

This 3 March, 1981.

/s/W. Earl Britt

U.S. District Judge

APPENDIX J

MEMORANDUM AND RESPONSE

NOW COMES the defendant, Southeastern General Hospital, Inc., through counsel, and hereby responds to motion of plaintiff to voluntarily dismiss without prejudice defendants Duke University, Inc., Duke University Medical Center, Duke Hospital, David F. Paulson, M.D., and Michael J. Moran, M.D.

In ruling on motion of plaintiffs to voluntarily dismiss without prejudice, those factors to be considered by the Court include the sufficiency of an explanation for the need to take a

dismissal. Thomas v. Amerada Hess Corp. D.C. Pa. 1975, 393 F. Supp. 58, 70. The essential question before the Court is whether dismissal of those parties will be unduly prejudicial to the remaining defendants. Nance v. Jackson D.C. Ala. 1972, 56 F.R.D. 463.

The plaintiff filed two actions which have been consolidated for trial; the first action in 1978 against Drs. Strawcutter, Burleson and Leininger, individually and as partners doing business as UROLOGY CLINIC; and the second action filed in 1979 against the defendants which plaintiff now seeks to voluntarily dismiss, and this defendant and Dr. Williamson.

In preparing the defense for Southeastern General Hospital, Inc. we considered the allegations of negligence against each of the other defendants in both cases. It appeared that there was

a continuing series of alleged negligent acts which resulted in the alleged injury, that it would be prejudicial to all defendants to try this case link by link, and the jury would have a better opportunity to render a fair verdict if the entire chain of events was placed before them.

Upon further reflection, we cannot contend our client will be prejudiced if said defendants are dismissed by the Court. It now appears to us that it is appropriate for our client to be heard along with and at the same time as the defendants in the 1978 action since these parties attended to the plaintiff at the same place and time.

I respectfully request that my objection to dismissal of defendants be withdrawn, and I apologize if my actions have inconvenienced the Court or counsel.

This 5 March 1981.

Respectfully,

/s/ W. C. Harris, Jr.

Attorney for Southeastern General Hospital, Inc.

APPENDIX K

RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF ITS RULE 41(a)(2) MOTION

Duke University, David F. Paulson, M.D. and Michael J. Moran, M.D. by and through counsel as a Response to plaintiff's Motion For Reconsideration of its previous motion filed pursuant to Rule 41(a)(2) request this Honorable Court to enter an order granting plaintiff's motion for a voluntary dismissal without prejudice as per the conditions set forth in the consent to the granting of said motion previously filed with this Court.

In Le Compte v. Mr. Chip, Inc., 528 F2d 601 (C.A. 5th, 1976) it is

written:

> "When considering a dismissal without prejudice, the court should keep in mind the interests of the defendant for it is his position which should be protected. 9 Wright & Miller, Federal Practice & Procedure: Civil §§2362,2364, at 149, 165 (1971). Nevertheless, in most cases a dismissal should be granted unless the defendant will suffer some legal harm. (citing authorities)..."

In the case at bar the parties who would be dismissed without prejudice if the motion is granted would be the only parties "harmed" and Duke University, Dr. Paulson and Dr. Moran have no objection to said motion being granted, and in fact continue to consent to the granting of said motion.

It should be brought to the attention of the Court that in Morrell v. Strawcutter (78-0009-Civ-3) a number of depositions were taken prior to the filing of Morrell v. Duke (79-0076-Civ-3). To possibly allow the use of those

depositions as against some of the parties could possibly work to the prejudice of the remaining parties who were not parties to plaintiff's claims at the time of the taking of said depositions and did not have the right to examine the witnesses. In addition to insist that plaintiff prosecute its alleged claims against Duke University, Dr. Paulson and Dr. Moran even though plaintiff desires to dismiss these parties would lengthen considerably the trial and create unnecessarily a great expense and inconvenience to Duke University, Dr. Paulson and Dr. Moran.

It is respectfully submitted and urged that this Honorable Court grant plaintiff's motion for voluntary dismissal pursuant to Rule 41(a)(2).

This the 26th day of March, 1981.

Newsom, Graham, Hedrick, Murray, Bryson & Kennon

By:

/s/ E. C. Bryson, Jr.

Attorneys for Duke University;

David F. Paulson, M.D.; and

Michael J. Moran, M.D.

CERTIFICATE OF SERVICE

The undersigned herewith certifies that he has this day served Petition for a Writ of Certiorari upon each of the attorneys of record of Respondent by depositing a copy of same in the United States Mail, postage prepaid, properly addressed to each of said attorneys at their respective last known mailing addresses, they being:

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This 24 day of September, 1982.

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